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ABSTRACT

This paper explored the question of the applicability of Title VI of the Civil Rights Act of 1964 and Title IX of the Educational Amendments Act of 1972 to public broadcasting. Basically, those provisions require recipients of federal grants to use those funds in a non-discriminatory manner such that the benefit of the programs funded by the grants is available without regard to race, national origin or sex. The thesis of the paper was that there are some questions whether Titles VI and IX can be applied to public broadcasting under the terms of the provisions themselves. And even if the Titles themselves permit their enforcement with respect to public broadcasting, serious First Amendment questions are raised both by their very application and by the procedures established for their enforcement. Legal precedents are cited to conclude that the objectives sought to be achieved by Titles VI and IX are secured by other means and the application of those provisions to public broadcasting would constitute an unwarranted burden on the system. (HAB)

Title VI, Public Broadcasting and the First Amendment

by Theodore D. Frank

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Title VI, Public Broadcasting & The First Amendment

by Theodore D. Frank[1/]

Public broadcasting constitutes a bold experiment in freedom, testing whether the federal government can provide financial assistance to a medium of mass communications without exercising the control and influence inconsistent with the freedom, autonomy and independence essential to a viable and credible press. The experiment is scarcely ten years old, but to date it appears to be working. Public broadcasting as an institution has, by and large, successfully weathered attempts to subvert its independence and autonomy.[2/]

However, challenges to that freedom and independence lie on the horizon. To some extent, those challenges are more threatening to the realization of the goals of the experiment than those weathered to date. For the challenges come not from those with malevolent objectives but from those whose goals are beneficent. That the challenge should come from such quarters is not surprising. Justice Brandeis warned some fifty years ago that: "Experience should

1/ I would like to thank M. Candace Fowler for the assistance provided in the preparation of this paper.

2/ See Macy, To Irrigate a Wasteland, Ch. III (U. of Calif. Press 1974).

teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928). It is with such well meaning, well intentioned governmental actions that this paper is concerned -- Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.*/ Its purpose is to explore, at least on a preliminary basis, the interrelationship of the enforcement of those Titles and the First Amendment as they apply to public broadcasting. Its thesis is that there is a substantial question whether the Titles can be construed to authorize the regulation of the programming of public broadcasters, and, even if they do, whether the enforcement of those Titles is consistent with the First Amendment.

I. Title VI and Public Broadcasting

Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides that no person "shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 901 of the Education Amendments of 1972, 20 U.S.C. §1681, extends that prohibition to discrimination on the basis of sex in educational programs receiving federal financial assistance. Section 602 of the Civil

*/ The full text of these provisions is attached as Appendix A.

Rights Act, 42 U.S.C. §2000d-1, and Section 902 of the Educational Amendments, 20 U.S.C. §1682, require that federal agencies "empowered to extend Federal financial assistance to any program or activity" adopt regulations to enforce those requirements. Those sections also authorize the termination of funds, upon the satisfaction of certain hearing and other procedural requirements, as the ultimate sanction for noncompliance with Sections 601 and 901, respectively. However, both Section 602 and Section 902 provide that any regulations adopted to enforce Section 601 or Section 901, respectively, must "be consistent with [the] achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

Public broadcasting receives federal financial assistance primarily in two ways. First, most public television and many public radio stations have received federal financial assistance under the Educational Television Facilities Act of 1962, P.L. 90-129, 81 Stat. 367, or one of its subsequent amendments. See 47 U.S.C. §390 et seq. Second, CPB receives a direct federal appropriation[3/] and the local stations receive a portion of that fund in the form of unrestricted community service grants. Under the Public Broadcasting Finance Act of 1975, P.L. 94-192, these unrestricted grants are required by statute, although the formula under which the total amount

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3/ See 47 U.S.C. §396(k).

each individual station will receive is left to the discretion of CPB acting in consultation with the stations. See Id. at §2; 47 U.S.C. §396(k)(5)-(7).

By their terms, Sections 601 and 901 apply to public stations which have received grants under the Facilities Act and the Department of Health, Education and Welfare, which administers the Facilities Act, has adopted regulations pursuant to Sections 602 and 902 implementing both of those Titles. See 45 C.F.R. Parts 80 and 86. While the provisions implementing Title IX do not specifically refer to the Facilities Act, the regulations under Title VI do, see 45 C.F.R. §80.2, Appendix A, Part 1, ¶5, and the language of the regulations under Title IX is broad enough to encompass stations which have received facilities grants. See 45 C.F.R. §86.11.

In general, these regulations prohibit recipients of grants of financial assistance from discriminating on the basis of race, color, sex or national origin. See 45 C.F.R. §§80.1 & 86.1. In accordance with their enabling statutes, the regulations implementing Title VI apply to any program administered by HEW in which financial assistance is provided while the Title IX regulations apply only to educational programs. See 45 C.F.R. §80.2 and §86.11. The regulations implementing Title VI set forth specific examples of prohibited discriminatory conduct, 45 C.F.R. §80.3(b), and give illustrative examples of

the obligations imposed as a consequence of Section 601 on recipients of federal assistance. See 45 C.F.R. §80.5. With respect to public broadcasting, the regulations provide:

> Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant. 45 C.F.R. §80.5(g)

The regulations under both Titles require applicants for assistance to provide the Department with assurances, as a condition of the receipt of any grant, that they are complying and will comply with the provisions of Sections 601 and 901. See 45 C.F.R. §§80.4 & 86.4. Both sets of regulations provide that where federal funds are employed to acquire personalty, the obligations imposed under the regulations obtain as long as the entity retains ownership of that property.[4/] See 45 C.F.R. §§80.4(e) & 86.4(b)(2)

The regulations under Title IX incorporate the compliance provisions of the Title VI regulations. See 45 C.F.R. §86.71. Those regulations require applicants to cooperate with the Department in its enforcement of the obligations imposed under Titles VI and IX including the submission of such compliance reports as the Department may

4/ As noted below, one of the enforcement techniques authorized with respect to Facilities grant is the requirement to repay funds to the Treasury. However, the obligation to repay is imposed under the regulations enforcing the Facilities Act and obtains only for a period of ten years from grant. See 47 U.S.C. §392(j); 45 C.F.R. §§153.16(4), 153.21(a). It is thus unclear whether HEW could require repayment after the expiration of the 10-year period.

require. See 45 C.F.R. §80.6. They also authorize the Department to conduct an investigation to determine whether recipients of federal funds are complying with the Titles and to institute termination proceedings if the Department finds a case of noncompliance. See 45 C.F.R. §§80.7 & 80.8. Termination procedures, which are largely statutorily required, include attempts at reconciliation and, in the event of failure of such reconciliation, a formal hearing under Section 5 of the Administrative Procedure Act. See 45 C.F.R. §§80.8-80.10. An ultimate finding of noncompliance after the hearing may result in the termination of assistance, disqualification from further assistance, or a requirement, in the case of Facilities grants, that funds be repaid to the United States.[5/] See 45 C.F.R. §80.8, 45 C.F.R. §153.21. The latter course of action would, however, appear to require the government to institute suit in the United States District Courts to obtain repayment.[6/] See 47 U.S.C. §392(f); 45 C.F.R. §153.21(d).

The effect of Title VI and Title IX on CPB and on the local stations as a result of their receipt of community service grants is not as clear as is the case under the Facilities Act. It would appear, however, that Sections 601 and 901 are applicable to both CPB and the local stations through their receipt

5/ Under 47 U.S.C. §392(f), recovery of funds is limited to the depreciated value of the facilities acquired.

6/ The provision of the statute authorizing recovery of funds is silent as to the nature of any such judicial proceeding. Thus, it is unclear whether the proceeding would be a trial de novo, see, e.g., 47 U.S.C. §504(e), or merely a review of an agency determination. See, e.g., 5 U.S.C. §701 et seq., 42 U.S.C. §2000d-2.

of community service grants since both receive federal financial assistance. Although it is arguable that the assistance to CPB is not pursuant to a program or activity as contemplated in the Act,[7] the provision of community service grants clearly is such a program. See Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974). That is especially true under the Public Broadcasting Finance Act of 1975 which specifically provides for the making of such grants. See 47 U.S.C. §396(k)(5)-(7). It would be highly anomalous to conclude that the stations are participants in a program subject to Sections 601 and 901 while CPB is not.

However, while CPB and the stations may be subject to Sections 601 and 901, it would appear that they are not subject to any regulations adopted pursuant to either Section 602 or 902. CPB receives its financial assistance in the form of a direct Congressional appropriation and thus no department or agency is "empowered to extend Federal financial assistance"[8]

7/ While not without doubt, it appears that Social Security payments, veterans' compensation, etc. are not "programs or activities under Title VI." See, e.g., Letter from Deputy Attorney General Katzenbach, 110 Cong. Rec. 2481; Remarks of Senator Ribicoff, 110 Cong. Rec. 8426.

8/ The Public Broadcasting Finance Act of 1975 specifically creates a fund in the Treasury for public broadcasting and it is from that fund that CPB draws its financial assistance. 47 U.S.C. §396(k)(3) and (4). While it could be argued that the U.S. Treasury is thus the agency "empowered to extend financial assistance" to CPB, and therefore is required to adopt regulations implementing Titles VI and IX, such an interpretation would strain the language of the statute. Moreover, such an interpretation would also require the Treasury Department to enforce Title VI against all the departments and agencies of the United States since they receive funds under the same terms as CPB. In view of the fundamental impact of such a requirement on the structure of the federal government, a far clearer statement of congressional intent to require that result is needed than exists in the case of Title VI.

to it. Consequently, it is highly doubtful that CPB is subject to any regulation implementing either Title VI or IX; but in all events, it is clear that it is not subject to HEW's implementing regulations. Since community service grants are made out of CPB's general appropriation and not from any appropriation to HEW, it would follow that local public stations are similarly not subject to HEW enforcement action as a consequence of their receipt of such funds.[9/]

Further, since Sections 602 and 902 authorize and direct only agencies or departments of the United States to adopt regulations implementing the substantive provisions of Titles VI and IX, it would appear that CPB is not required to enforce those Titles. As established in greater detail below, those who urged the provision of federal financial assistance to what was to become public television recognized that the provision of such assistance carried with it the threat of governmental control over the system. In order to minimize that threat, they argued that the system had to be insulated, to the extent possible, from the source of its funds. One of the techniques employed to achieve that insulation was the use of a private nongovernmental corporation. That corporation was to serve as a buffer between the operational elements in the

9/ The HEW regulations provide that they are applicable to "Construction of educational broadcast facilities (47 U.S.C. 390-399)." This latter reference is confusing. The Facilities Act is codified as 47 U.S.C. §390-95, 397-98. Community service grants are made by CPB pursuant to 47 U.S.C. §396. It is thus not clear whether, by including Section 396 within its regulation, HEW has taken the position by this regulation applies to community service grants or whether the regulation is merely the result of oversight.

system and the funding source.[10] Thus, while CPB's creation was provided for by statute, CPB was declared in that statute to be a private corporation and not an agency or department of the United States. See 47 U.S.C. §§396(a)(6) and 396(b). Consequently, it would appear that neither Section 602 nor Section 902 applies to CPB and it is neither directed nor authorized to adopt regulations or procedures to enforce or implement Section 601 or Section 901.

The Civil Rights Division of the Department of Justice has, however, taken a somewhat contrary position at least with respect to Title VI.[11] While acknowledging that CPB is not an agency or department of the United States, and thus is not required by Section 602 to adopt implementing regulations, the Division nonetheless has argued that: "Because there is no federal agency or department which funds and supervises CPB programs and activities, we think that CPB is obligated itself to ensure that the provisions of 42 U.S.C. 2000d are carried out." Thus, the Division recommended that CPB obtain a contractual commitment of compliance with Title VI from each recipient of CPB financial assistance and, in addition, asserted that:

> ". . . we think CPB is required to ascertain whether the recipients of CPB assistance are in fact complying with Title VI. This could be done by having CPB conduct Title VI compliance reviews itself, or by delegating that authority

10/ See Accuracy in Media, Inc. v. FCC, 521 F.2d 288 (D.C. Cir. 1975), cert. denied, ___ U.S. ___ (1976).

11/ The Department of Justice has no enforcement or other responsibilities with respect to Title IX and has thus declined to comment on CPB's responsibilities under that provision. See Letter dated November 18, 1975 from J. Stanley Pottinger, Esquire, Assistant Attorney General, Civil Rights Division, Department of Justice, to Representative Louis Stokes.

> to a federal agency. Because of CPB's limited staff and because persons from the Department of Health, Education & Welfare already conduct Title VI compliance reviews of noncommercial stations receiving federal assistance from HEW, a delegation of authority from CPB to HEW would appear to be an efficient way to monitor compliance with Title VI." 12/

The Division's conclusion is open to debate. While it appears that Section 601 is applicable to CPB and to those to whom it provides financial assistance, there is nothing in Title VI which would indicate that CPB is required to enforce or even monitor it. The enforcement scheme established by the statute is clear: federal agencies and departments which administer programs of financial assistance are to adopt rules and regulations to insure compliance with the mandate of Section 601; no such obligation is imposed on private parties. Since the Public Broadcasting Act provides that CPB is a private entity, it is difficult to perceive any obligation to enforce the requirements of Section 601. 13/

Moreover, such enforcement would be wholly inconsistent with CPB's status as a private corporation

12/ Letter dated March 26, 1975 from J. Stanley Pottinger, Esquire, Assistant Attorney General, Civil Rights Division, Department of Justice, to Thomas G. Gherardi, Esquire, General Counsel, CPB. See also, Letters dated August 12, 1975 and September 25, 1975 from Mr. Pottinger to Mr. Gherardi.

13/ That does not mean that recipients of CPB assistance are necessarily immune from attempts to insure compliance with Sections 601 and 901. However, the question of whether a private party may sue directly under 42 U.S.C. §2000d for enforcement of that section is beyond the scope of this paper. See, e.g., Cort v. Ash, 420 U.S. 66 (1975); Allen v. State Board of Elections, 393 U.S. 544 (1969). However, it appears that private actions may be brought against state bodies or those acting under color of state law under 42 U.S.C. §1983. See, e.g., Player v. Alabama Dep't. of Pensions & Security, 400 F. Supp. 249 (M.D. Ala. 1975); Wade v. Mississippi Coop. Extension Serv., 372 F. Supp. 126 (N.D. Miss. 1974).

and with the statutory scheme of the Public Broadcasting Act. As indicated above, CPB was envisioned under the Act as a mechanism to provide leadership, guidance, financial assistance and insulation to the system. It was charged with aiding, assisting and encouraging the development of a wide variety of functions Congress found to be important to the realization of a public broadcasting system which carries high quality programs obtained from diverse sources and responsive to the needs of the public. See 47 U.S.C. §396(a). At the same time, it was to avoid, to the extent possible, any interference with the operation of the local stations. To that end, Congress mandated that CPB was to carry out its functions under the Act in a manner which maximizes the independence of the local stations. See 47 U.S.C. §396(g)(1)(D). CPB enforcement of Title VI is clearly inconsistent with that scheme. It would involve CPB far more with the operation of the local stations than contemplated under the Public Broadcasting Act.[14/] Cf. Columbia Broadcasting

14/ Amendments to CPB's authorization bills requiring CPB to enforce Titles VI and IX have been introduced on the House floor in the last two sessions of Congress. In 1975 the House passed the Amendment, 121 Cong. Rec. 10883 (1975), but it was deleted in Conference in part on the basis that it was inconsistent with CPB's function. See H.R. Rep. 94-713, 94th Cong., 1st Sess. (1975).

Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). In addition, the delegation by CPB, a private corporation, to HEW, a governmental department, and of responsibilities which CPB is not statutorily required to perform and which HEW is not authorized to perform would appear to raise constitutional questions.

Although it appears that CPB is not required to undertake the enforcement of Title VI or Title IX,[15/] it has adopted a policy on equal opportunity and that policy is made part of any grant from or contract with CPB. Under that policy recipients of CPB assistance, whether in cash or in kind, are required to remain aware of and to adhere to all laws regarding equal opportunity. CPB may suspend or terminate assistance, including community service grants and programming, when a recipient is adjudged by a court or agency with jurisdiction to be in violation of an equal opportunity law.[16/] Recipients found to

15/ CPB is a government contractor and is thus subject to Executive Order No. 11246. That order requires government contractors to require their subcontractors to adhere to the order. However, the requirements of the Order relate to employment and not to programming.

16/ There is some question whether this policy comports with the requirements of 47 U.S.C. §396(g)(1)(B) and the Public Broadcasting Finance Act of 1975. The former provision, 47 U.S.C. §396(g)(1)(B) provides that programs distributed over an interconnection system assisted by CPB must be made available to the stations for broadcast at times of their choosing. Since CPB would appear to have no authority to require compliance with equal opportunity rules, it is questionable whether it may deny stations access to programs distributed over the interconnection because they have been found guilty of violations of equal opportunity laws. Similarly, the Public Broadcasting Finance Act of 1975 requires CPB to make at least certain minimum unrestricted grants to the local television stations.

be in violation remain ineligible for CPB assistance until they can demonstrate to the corporation that the violation has been corrected or that it is in compliance with all remedial provisions of any such adjudication. Finally, unlike Titles VI and IX, which permit termination of financial assistance only with respect to specific programs as to which a violation has been found,[17] this policy applies if there is noncompliance in any activity of a CPB recipient, regardless of whether or not such activity was aided by CPB support.[18]

Thus, although CPB does not appear to be authorized or required by statute to enforce either Title VI or Title IX, it has through the adoption of its policy on equal opportunity achieved a highly analogous result.[19] As is the case under both Title VI and Title IX, compliance with equal opportunity laws is sought to be achieved through the threat of the loss of assistance for noncompliance. Thus, recipients of any form of assistance from CPB are threatened with the loss of that assistance if they are found to be in violation of any equal opportunity laws. Moreover, it appears that this policy covers

17/ See Taylor County Bd. of Public Instr. v. Finch., 414 F.wd 1068 (5th Cir. 1969); 42 U.S.C. §2000d-2.

18/ See attachment to Letter dated June 30, 1975 from Robert S. Benjamin, Esq., Chairman, Board of Directors, Corporation for Public Broadcasting, to Mr. Clarence M. Mitchell, Director, Washington Bureau, N.A.A.C.P.

19/ By its reliance on findings of others, CPB has avoided to some degree the interference with the operation of the local public stations which direct Title VI or Title IX enforcement would involve.

not only findings of discrimination under specific "equal opportunity laws", but any finding of discrimination. In the only case in which CPB has acted under the policy,[20/] the FCC had denied the renewal applications of the Alabama Educational Television Commission on the grounds that AETC had pursued a discriminatory program policy which ignored the needs of Blacks in the State of Alabama. While CPB did not terminate AETC's assistance, largely because of the FCC's further finding that AETC had, during the pendency of the proceeding, corrected its past practices, CPB's use of the FCC's finding of program discrimination appears to indicate that it intends to construe the policy broadly.[21/]

As a result of this policy, the impact of HEW enforcement extends, as a practical matter, far beyond the limitations of the Facilities Act. For while HEW's actual enforcement powers are limited to that Act, public broadcast stations found by HEW to be in violation of Title VI or Title IX stand to lose their community grants and access to programming produced with CPB funds or perhaps distrubuted by means made possible with CPB funds.

20/ See attachment to letter dated June 30, 1975 from Robert S. Benjamin, Esquire, note 12, supra.

21/ There is substantial question whether CPB acted within the scope of its own policy. That policy requires a final adjudication by a court or agency with jurisdiction that the recipient is in violation of a law prohibiting discrimination before suspension or termination proceedings may be instituted. The Communications Act contains no such provision -- it merely requires operation in the public interest -- a vastly different concept.

II. Title VI Enforcement and Public Broadcasting -- A Question of Statutory Authority

HEW's enforcement powers under Title VI and Title IX derive from the provisions of Sections 602 and 902, respectively. Those sections authorize agencies or departments of the federal government to adopt rules, regulations or orders of general applicability to implement the substantive provisions of those Titles with respect to programs or activities as to which they are empowered to extend financial assistance. At the same time, both Sections require that any such rules, regulations or orders "be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." By its terms, this clause constitutes a limitation on the nature of any regulation which an agency or department may adopt to implement Title VI or Title IX. Only those regulations consistent with the objectives of the statute authorizing the program or activity for the provision of financial assistance would consequently appear to be authorized. Thus, the validity of any regulation under the Facilities Act must be tested in the context of that Act.

This interpretation of the clause finds support in the legislative history of the Act, although there is some indication that it is to be given a different construction. The clause was not included in the administration's bill, nor was it included in the bill reported out of the House Judiciary

subcommittee. It first appeared in the compromise bill reported out by the full House Judiciary Committee. Unfortunately, it was not explained in the Committee Report, and floor debate relative to the clause is not altogether consistent. Some cited the clause for the proposition that all avenues of reconciliation must be exhuasted before a fund cut-off can be effected, while others indicated that it required agency regulations to be consistent with the objectives of the statute providing for financial assistance. Thus, Senator Ribicoff stated:

> "The remedies provided by Section 602 are withholding of assistance and any other means authorized by law. In general, the consistent-with-the-objectives requirement would make withholding of funds a last resort, to be used only when other means authorized by law were unavailable or ineffective." 22/

On the other hand Senator Pastore stated, after quoting the clause:

> That provision means that, if Congress were to adopt a program, for example, of providing milk to the pupils of America, and it were discovered that some States or communities were authorizing only white drivers to deliver the milk to the schools, the program could not be shut off for that reason. The law was not adopted to avoid discrimination in the employment of milkmen; the law was passed to give milk to the school children. The violation must be associated with the reason why the law was passed.

22/ 110 Cong. Rec. 7066 (1964); see also, 110 Cong. Rec. 7063 (1964).

> Therefore, unless the violation fell under Title VII, there would be no limitation under Title VI that would allow an agency to shut off milk to a certain area because only white drivers were hired to deliver the milk. That was not the purpose of the law. The purpose of the law was not to create jobs for milkmen. The purpose of the law enacted was to give milk to pupils. Therefore, the discrimination must be a violation of the purpose of the law. 23/

It would appear that the latter is the better reading of the statute. The limitation obtains with respect to agency regulations and not to enforcement actions. Thus, it strains the statutory language to apply the provision as a limitation on when assistance may be terminated. Moreover, Section 602 is replete with procedural safeguards designed to insure that the cut-off of funds is used only as a last resort. Thus, the Section requires efforts at voluntary compliance, an evidentiary hearing, a notice to the committees of Congress with legislative jurisdiction followed by a 30-day waiting period before termination may be effected.

Further, this construction accords with the manner in which the Court dealt with the clause in the only case found construing it. Gardner v. Alabama, 384 F.2d 804 (5th Cir. 1967). That case involved enforcement of Title VI with respect to the welfare provisions of the Social Security Act, e.g., Titles I, IV, V (Part 3), X and XIV. HEW had threatened to terminate assistance because of Alabama's refusal to execute a statement of compliance agreeing to take steps to provide reasonable

23/ 110 Cong. Rec. 9127-28 (1964).

assurance that agencies and organizations, whether private or governmental, which received funds under the welfare program did not discriminate. Alabama challenged the regulation that required this statement of compliance. Alabama argued, among other things, that obligating it to insist upon integrated private nursing homes, hospitals, etc. was inconsistent with the objective of the funding program which was to provide assistance to the poor, the needy and the aged. The Court rejected the argument finding that HEW's requirement that the State undertake reasonable efforts to assure nondiscrimination in the provision of old age benefits, ADC and other welfare programs was not inconsistent with the general objectives of the Social Security Act. In reaching that conclusion, the Court did not focus on whether HEW had exhausted all other remedies short of termination, but rather dealt exclusively with whether the regulation requiring Alabama to obtain assurances of compliance from private agencies was consistent with the objectives of the Social Security Act.

This construction of the clause raises substantial questions as to whether HEW has enforcement powers under the Facilities Act. When Congress first considered the provision of financial assistance to noncommercial educational broadcasting by making funds available for the construction of educational television stations, it recognized that the provision of such funds could serve as a mechanism through which federal control could be exercised over the programming broadcast by those

stations. In order to prevent that result, the Bill as originally introduced, provided that "Nothing in this Act shall be deemed (a) to give the Commissioner of Education any control over television broadcasting . . ." S. 205, 87th Cong., 1st Sess. ¶6 (1961). The Bill passed the Senate with this language. Id. The House, however, modified the provision to read as follows:

> "Nothing contained in this part shall be deemed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television broadcasting or over the curriculum, program of instruction, or personnel of any educational institution, school system or educational broadcasting station or system."

This language became Section 397 of the Educational Television Facilities Act, P.L. 87-447, 48 Stat. 1081.

The floor debate leaves no doubt that Congress intended to preclude HEW from using its power to grant facilities funds as a means of controlling the programming of the non-commercial educational licensees who applied for and obtained those grants. Thus, Congressman Elliott, floor manager for the bill, stated that "'the matter of the content of educational television programs of instruction is [to be] left in the hands of the states where it rightfully belongs." 107 Cong. Rec. 3530. Similarly, Congressman Walter stated:

> "This Bill for matching grants to the States for the construction of educational television facilities clearly prohibits the federal government from exercising any control of educational television programs. This is as it should be. I never want to see the day when the Federal government interferes with any phase of public or private education."

Section 397 was modified in 1967 when Congress passed the Public Broadcasting Act of 1967. Renumbered Section 398, the provision was broadened to encompass public radio stations and the Corporation for Public Broadcasting. However, that modification was not designed to change the purpose or intent of the provision. Indeed, since Title II of the Public Broadcasting Act provided funds, for the first time, for the creation of programs, Congress was even more adamant that the provision of these funds should not be used as a basis for the exercise of federal control over the operation of public broadcasting. The House Report was explicit:

> "Why a Corporation for Public Broadcasting?
>
> How can the federal government provide a source of funds to pay part of the costs of educational broadcasting and not control the final product? That question is answered in the Bill by the creation of a non-profit educational broadcasting corporation. Every witness who discussed the operation of the corporation agreed that funds for programs should not be provided directly by the Federal government. It was generally agreed that a non-profit corporation, directed by a Board of Directors, none of whom will be government employees, will provide the most effective insulation from government control or influence over the expenditure of funds. 24/

24/ H. Rep. No. 572, 90th Cong., 1st Sess. 15 (1976).

The Senate Report was equally clear:

> "It is clear, however, that the programs presented by educational broadcasting systems need to be of the highest obtainable quality if educational broadcasting stations are to make optimum use of the scarce channels they occupy and the facilities with which they have been provided. There is general agreement that for the time being, federal financial assistance is required to provide the resources necessary for quality programs. It is also recognized that this assistance should in no way involve the Government in programming or program judgment." 25/

This Congressional intent to insure the separation between and insulation of the system from the government was recognized in Accuracy in Media, Inc. v. FCC, 521 F.2d 288 (D.C. Cir. 1975) and given constitutional underpinnings. That case involved the question of whether the Commission had jurisdiction to enforce a provision of Section 396(g)(1)(A) with respect to the Corporation. 26/ The Court, after careful

25/ S. Rep. No. 229, 90th Cong., 1st Sess., 4 (1967).

26/ Section 396(g)(1)(A) provides that:

> In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to --
>
> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

The Commission's power to enforce the clause requiring "objectivity and balance" in programs of a controversial nature was in issue in the case.

consideration of the legislative history of the Public Broadcasting Act, the statutory scheme created by that Act, and the provisions of Section 398, concluded that Section 398 precluded any FCC supervision of the operations of CPB. The Court found that Section 398 was intended to assure the insulation of CPB and the public broadcasting system from pressure arising from its funding. It concluded that FCC enforcement of the provisions of Section 396(g)(1)(A) was inconsistent with that provision and with the general thrust of the Act to preclude governmental control over programming. The Court stated:

> "The framework of regulation of the Corporation for Public Broadcasting we have described -- maximum freedom from interference with programming coupled with existing public accountability requirements -- is sensitive to the de facto constitutional balance between the First Amendment rights of the broadcast journalist and the concerns of the viewing public struck in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed. 2d 772 (1973)."

The Court went on to note:

> "The expansion of the prohibition [of Section 397/398] to apply to the Corporation and its activities is in keeping with the original fear that financial support by the government could lead to control over speech."

In view of the clear statutory language of Section 398 and the unequivocal legislative history of the provision, it is highly doubtful whether HEW may adopt regulations

pursuant to Section 602 or Section 902 if those regulations involve HEW in "any direction, supervision or control" over public broadcast stations. HEW's present regulations appear to involve such prohibited control. Section 80.5(g) of those rules specifically requires public broadcasters to "give due consideration (in their broadcast activities) to the interests of all significant racial groups within the population to be served by the applicant." That requirement would appear to give HEW the power to review a public broadcaster's programming to determine whether "due consideration" -- however defined -- has been given to the relevant groups. Such superintendence clearly contravenes the prohibitions of Section 398. Cf. Accuracy in Media, Inc., supra.

Finally, even if Section 80.5(g) is not intended to give HEW supervisory power over the programming of a public broadcast station but is only intended to require some form of "ascertainment" -- a strained construction of the language -- problems would still exist. The regulation is devoid of any cognizable standard as to what would constitute "due consideration"

in such a context and what HEW's powers would be if the public broadcaster ascertained but determined not to broadcast programming related to the unique needs of a "significant racial group." Similarly, the regulation is silent as to how a "significant racial group" is defined. In the absence of a clear statement of policy which evidenced an unmistakable recognition that it did not possess the power to exercise any "direction, supervision or control" over the programming of a public station, HEW's adoption and enforcement of regulations to implement Sections 601 and 901 would appear to be beyond the grant of authority contained in Titles VI and IX.

III. Title VI Enforcement and Public Broadcasting -- Constitutional Considerations

Whether or not Title VI or Title IX authorize HEW to adopt implementing regulations with respect to public broadcasting, the adoption of such regulations and their enforcement by HEW would appear to raise serious questions under the First Amendment. That Amendment is designed to assure the "widest dissemination of information from diverse and antagonistic sources," Associated Press v. United States, 326 U.S. 1, 20 (1945), and to promote the fullest and freest debate on public issues, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964). To that end, it prohibits governmental interference or the exercise of governmental control over speech

and press in the absence of compelling public interest considerations which would justify such an intrusion into protected activity. See, e.g., City of Chicago v. Mosley, 408 U.S. 96 (1972); United States v. New York Times Co., 403 U.S. 713 (1971); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). Indeed, even neutral governmental regulations which incidentally or indirectly inhibit speech must be narrowly drawn to achieve objectives clearly within the power of the State.

> "Where a statute does not directly abridge free speech, but -- while regulating a subject within the State's power -- tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

Younger v. Harris, 401 U.S. 37, 51 (1971); see also Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229, 237 (1936); Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939).

The adoption and enforcement of regulations to implement Titles VI and IX with respect to public broadcasters would involve the federal government in the regulation of speech and press. Public broadcasters are enjoined by those Titles from discriminating in their programming on the basis of race, sex, color or national origin or from denying the benefits of

broadcasting to any person on such a ground. As indicated above, the present HEW regulations implementing these Titles appear to give HEW the power to review the programming of public licensees to determine whether their programming satisfies that mandate. While those regulations are clearly not the only possible implementing guidelines which could be adopted, it is difficult to envision such rules which did not involve the power to pass upon whether the programming of a licensee discriminated against a racial group or individual or denied the benefits of broadcasting to individuals of a given national origin.

This is particularly true in view of the provisions of Section 604 of the 1964 Civil Rights Act, 42 U.S.C. §2000d-3, which appear to limit severely HEW's use of enforcement mechanisms not directly dealing with programming. Section 604 provides that:

> Nothing contained in this subchapter shall be construed to authorize any action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment [Emphasis added]

By its terms, this provision would appear to prohibit HEW from regulating the employment practices of public broadcasters as a means of accomplishing Title VI enforcement under the Facilities Act. This interpretation is fully supported by the

legislative history of the Civil Rights Act of 1964. That legislative history clearly establishes that the provision was inserted to remove any doubt that Section 601 was not to be used as a lever to regulate the employment practices of recipients of federal assistance unless the program pursuant to which financial aid was provided was primarily designed to aid employment. Consequently, it would seem that HEW is precluded from achieving Title VI enforcement by requiring, for example, the employment of minorities or women as a means of insuring programming responsive to the needs of those groups or by obligating public broadcasters to employ minority or women employees in positions where they will have input with respect to programming.

HEW has, however, apparently taken a contrary position. Section 80.3(c) of its rules provides that nondiscrimination in employment is required, even where the purpose of program does not relate to employment, if "discrimination on the ground of race, color or national origin in the employment practices of the recipient . . . tends, on the ground of race, color or national origin, to exclude individuals from participation in, to deny them the benefits of, or subject them to discrimination under any program" subject to Title VI. The regulations however, limit the scope of the obligation to the extent such nondiscriminatory employment is necessary to secure the

realizations of the objectives of Title VI.[27] The legality of that regulation is open to question in view of Section 604.[28] But Cf. United States v. Jefferson County Board of Educ., 372 F.2d 836, 882-86 (5th Cir. 1967), decree modified 380 F.2d 385 (5th Cir. 1967) (en banc), cert denied, 389 U.S. 840 (1967).

However, even if HEW's regulations implementing Titles VI and IX employed non-programming criteria, the procedural requirements of Section 602 and 902 and the practical implications of the severity of the ultimate sanction of termination militate strongly towards governmental involvement with programming. Under both Section 602 and Section 902, HEW is required to attempt to obtain voluntary compliance with the mandate of the respective Titles. That requirement will in many cases give the government, if only for practical reasons, the power to control the programming of licensees. Licensees subject to enforcement procedures concerned lest they fail to come into voluntary compliance will, in most cases, accept whatever HEW insists upon and in many cases will seek assurances from enforcement officials that what they are doing, or more likely what they propose to do, satisfies the mandate of the Act. The likelihood of such HEW involvement in the programming of licensees is heightened by the severity of the ultimate sanction

27/ Where that line is drawn is difficult to articulate. National Broadcasting Co. (WRC-TV), ___ FCC 2d ___, 36 R.R. 2d 359 (1975).

28/ It is possible, however, that because of the First Amendment problems which regulation of programming would involve, an attempt by HEW to seek compliance with Titles VI and IX by means of review of employment practices would be upheld notwithstanding the provisions of Section 604.

of termination of assistance or repayment of funds to the Treasury, and is further enhanced by CPB's policy of terminating community service grants and perhaps access to national programming upon an adverse HEW finding. In fact, under CPB's policy, the mere finding by HEW of noncompliance can result in the suspension of community service grants even though the finding is on appeal and HEW is subject to a judicially imposed stay order. These factors make the pressure on a licensee to come into compliance significant, and the likelihood of HEW becoming involved in programming great.

Given the prospect that Title VI and IX enforcement will result in program regulation and the present apparent assertion of such authority under 45 C.F.R. §80.5(g), serious First Amendment questions are raised concerning the validity of HEW enforcement. Whether that enforcement passes constitutional muster turns on whether it can be justified by other compelling interests. Two such interests are apparent: first, we are dealing with the broadcast medium which has a public interest obligation not borne by other media. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Thus, some obligations may be imposed on broadcasters which may not constitionally be imposed on others. Compare Red Lion, supra, with Miami Herald Publishing Co. v. Tornillo,

418 U.S. 241 (1974). Second, Title VI and Title IX are imposed as conditions on the receipt of federal funds and are designed to achieve the realization of goals themselves well-rooted in the constitution. In fact, the obligations imposed by those Titles may be constitutionally mandated. See Norwood v. Harrison, 413 U.S. 455 (1973). But see Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Notwithstanding those considerations it is questionable whether enforcement of Titles VI and IX is constitutional.

A. The Public Interest Obligation Of A Broadcaster

Public broadcasters, as all broadcasters, are licensed by the Federal Communications Commission to serve the public interest, convenience and necessity for three year terms. While the acceptance of that license has been held to render the broadcaster a public trustee, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); United Church of Christ v. FCC, 359 F.2d 994 (D.C. 1966), broadcasters do not thereby surrender their First Amendment rights.[29/] See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Cf. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1973); Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975). Rather, broadcasters have been held, as a consequence of the licensing scheme of the Communications Act, to assume certain obligations which may

29/ It is clear that public broadcast stations licensed to nonprofit corporations enjoy virtually the same First Amendment rights as commercial broadcasters. The scope of the First Amendment rights of stations licensed to state or local instrumentalities is not as clear.

not constitutionally be imposed on others. Compare Red Lion, supra, with Tornillo, supra. But it is clear that the imposition of those obligations rests on the limited availability of the spectrum and the resulting necessity for governmental licensing. Thus it was on this basis that the Supreme Court upheld the validity of the fairness doctrine in Red Lion, supra. See also Columbia Broadcasting Sys., Inc., supra, Buckley v. Valeo, ___ U.S. ___, 46 L.Ed. 2d 659, 705 n. 55 (1975). Because the limitation on the spectrum necessitated governmental denial of access by some in order to permit access by any, see National Broadcasting Company v. FCC, 319 U.S. 190 (1945), licensees may not monopolize their allotted frequencies solely for the expression of their own views: it is the public interest they are obligated to serve and it is the public's right to access to diverse ideas and experiences which takes precedence.

> Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistent with the ends and purposes of the First Amendment. It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount...It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will untimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or by a private licensee. 30/

30/ 395 U.S. at 390; Accord, Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

Although a rather persuasive argument can be made that the obligations of Titles VI and IX serve the objectives of promoting the public's access to diverse ideas and experiences, the obligation imposed by those provisions derives not from the inherent spectrum limitations which support the FCC's regulation of broadcasters but from the provisions of the 13th, 14th and 15th Amendments. Whether HEW may employ the Commission's regulatory base to support its enforcement of Titles VI and IX is open to doubt. By doing so, HEW is, in fact, assuming the regulation of communications, something which the Communications Act confers exclusively to the FCC..

Moreover, the sanctions of failure to renew or revocation of license, which are solely within the FCC's jurisdiction, are specifically related to the scarcity which justifies the incursion on speech. Should a licensee fail to operate in the public interest, the FCC is empowered to take its permit away in order to make that scarce resource available to others who, hopefully, will better use it. The FCC's action is predicated on the objective of maximizing the total quality and quantity of broadcast service available to the public. HEW enforcement, on the other hand, would seek a very different aim -- an aim unrelated to the spectrum. HEW need not consider, in applying sanctions, whether the overall community service of a licensee has been good, nor whether the licensee's limited

efforts with respect to a given minority is justified by alternative service from elsewhere in the community. It may apply the sanction of withdrawal of funds, which may effectively force the public broadcasters to cease operation, without concern for the overall impact of such action or the utilization of the spectrum. Thus, to rest HEW's enforcement powers on the limited spectrum without imposing the overall regulatory obligations to promote the uses of the spectrum might ultimately deny not only the freedom of speech of the broadcaster, but also the First Amendment right of the public to diversity.

But even assuming HEW's ability to support its enforcement efforts on the basis of spectrum consideration, it is questionable whether that statutory predicate is sufficient to enable HEW to achieve the goals of those Titles. The extent of the Federal Communications Commission's jurisdiction over the programming of its licensees is still open to debate. While the fairness doctrine has withstood judicial scrutiny, it is clear that the extent of the Commission's jurisdiction under that doctrine is limited. The Supreme Court in Columbia Broadcasting System, Inc., supra, made it clear that broadcasters retain the "widest journalistic freedom consistent with [their] public obligations" and that Commission interference with a broadcaster's control of its facilities is justified "only when the interests of the public are found to outweigh private journalistic interests of the broadcasters." 412 U.S. at 110. Accordingly,

the Court rejected a right of access to broadcast facilities, finding that the "risk of an enlargement of government control over content of broadcast discussion of public issues" was too great to pass constitutional scrutiny. Id. at 126-27. The Court stated:

> The risk is inherent in requiring regulations and procedures to sort out requests to be heard -- a process involving the very editing that licensees now perform as to regular programming. Although the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, ...[t]he Government's power over licensees... is by no means absolute and is carefully circumscribed by the Act itself. 412 U.S. at 126.

Thus, the balance between the divergent First Amendment interests of the broadcasters and the public must be struck somewhere short of substantial governmental involvement in the exercise of broadcast journalistic discretion. And "no court has gone so far as to authorize the Commission to forbid a broadcaster to carry a particular program . . . or to dictate to licensees 'what they may broadcast or what they may not broadcast.' Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 47, 480 (2d Cir. 1971)," Notice of Inquiry in Changes in Program Formats (Docket No. 20682, * * R.R. 2d 53:481, 505 (Comm'r, Robinson concurring). Indeed, in the recent decision of Strauss Broadcasting v. FCC, ___ F.2d ___ (D.C. Cir. 1976), the Court held that the Commission could not substitute its discretion in determining whether a

personal attack was made in the course of a discussion of a controversial issue of public importance. A licensee's characterization of the nature of the discussion was to be binding in the absence of clear evidence of an abuse of discretion. See also, National Broadcasting Company v. FCC, 516 F.2d 1101 (D.C. Cir.), vacated as moot, 516 F.2d 1180 (D.C. Cir. 1975); Healey v. FCC, 460 F.2d 917 (D.C. 1972).

These limitations have been recognized by the Commission itself which has consistently held that licensees have broad discretion under the fairness doctrine to determine whether a controversial issue has been discussed and the extent to which opposing viewpoints are to be discussed. Fairness Report, 48 FCC 2d 1, 10-17 (1974). Similarly, it has refused to inquire into the news programming of licensees in the absence of extrusinic evidence of intentional news distortion or slanting. See, e.g., The Selling of the Pentagon, 30 FCC 2d 150 (1971). Further, in the programming area itself, the Commission has, with limited exceptions, rejected challenges to the operation of broadcast stations on the grounds that the licensee failed to serve the interests of a particular group or segment of its service area. Thus, it has consistently rejected assertions that licensees are obligated to broadcast programming designed for specific target audiences or that programs dealing with problems of general interest in the community are not relevant to the needs of specific segments of that commurity. See, e.g., Stone v. FCC,

466 F.2d 316, reh. den., 466 F.2d 311 (D.C. Cir. 1972); Westinghouse Broadcasting Co., 48 FCC 2d 1123 (1974). In those limited instances in which the Commission has acted on programming allegations, the challengers have been able to show, or make a prima facie case, that the licensee has consciously ignored or otherwise totally failed to serve a particular segment of the community. See Alabama Educational Television Comm'n, 50 FCC 2d 461 (1975).

Since HEW's regulatory authority would, under this theory, be derived from the FCC's, it could not exercise a greater degree of control over programming than the FCC itself. However, it is questionable whether the Commission's limited jurisdiction with respect to programming is sufficient to satisfy the statutory mandate of Titles VI and IX. HEW's regulations under Title VI would indicate that it is not. Section 80.5(g) specifically requires licensees to give "due consideration" in their broadcast activities to the needs of significant minority or racial groups within their area. Similarly, the definition of discriminatory activity in Section 80.3 of the HEW regulations and judicial decisions under Title VI in other contexts would appear to indicate that Title VI in fact imposes affirmative obligations on recipients of federal financial assistance to insure that the benefits of the program are made available to all segments of society equally. See, e.g., Lau v. Nichols,

414 U.S. 563 (1974). Commission decisions indicate that no such obligation obtains under the Communications Act. See WGBH Educational Foundation, ___ FCC 2d ___, 36 R.R.2d 456 (1976). Thus, it would appear that, even if HEW could predicate Title VI and IX enforcement on the FCC's statutory base, that predicate will not support the scope and type of enforcement contemplated under those Titles.

B. Control of Federal Funds

It is true that as a general matter Congress may control the manner in which federal funds are spent and thus may set the terms and conditions on which federal funds are made available. However, that control is not without limits and, while it has not always been the case, it is generally now conceded that Congress may not condition the receipt of federal funds on the surrender of constitutional rights. Cf. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 573 (1958). Consequently Congress may not attempt to achieve, through the device of a condition on the availability of federal largesse, a result it may not achieve directly. It is questionable whether the governmental interest reflected by Titles VI and IX is sufficiently compelling to warrant their impact on the First Amendment.

There is no denying that the interest sought to be achieved through Title VI and IX is a compelling one. The elimination of discrimination on the basis of race, color or national origin finds its root in the reconstruction amendments and, at least since Brown v. Board of Education, 347 U.S. 483 (1954), the elimination of such discrimination in all governmental activities is clearly established federal policy. That policy also applies in those situations in which private conduct becomes so entwined with government that it can be said to be governmental conduct, see e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), and the presence of federal funds is one indication of such involvement. Cf. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 538 (1964). Indeed, it is possible, though doubtful, that the mere presence of government funds makes the anti-discrimination requirements of Sections 601 and 901 constitutionally required. Compare Norwood v. Harrison, supra, with Moose Lodge No. 107 v. Irvis, supra.[31/] The elimination of discrimination based on sex is not well recognized but it is sufficiently well established[32/] to make its achievement well within the permissible interests of the state.

30/ See also, e.g., Bob Jones University v. Johnson, 396 F.Supp. 597, 607-08 (1974), aff'd sub. nom., Bob Jones University v. Roudebush, 4th Cir., May, 1975 (unreported); Green v. Connally, 330 F.Supp. 1150, 1167 (D.D.C.) aff'd sub. nom. Coit v. Green, 404 U.S. 997 (1971).

31/ See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973).

Whether that interest is sufficiently compelling to warrant governmental intrusion into the exercise of First Amendment rights is a close question. The First Amendment protects speech advocating unpopular ideas, ideas whose effectuation is inconsistent with constitutional precepts and even ideas that urge the transformation or alteration of our form of government. Indeed, protecting those who espouse positions inconsistent or at variance with governmental goals or policy is a major purpose of the Amendment. Thus, as a general matter, the Courts have invalidated regulations which penalize those who espouse particular viewpoints or regulations which effect those of a specific persuasion differently than others. That is true regardless of whether the regulation is one which prohibits or inhibits speech or is one imposing an affirmative obligation. See Miami Herald Publishing Co. v. Tornillo, supra. Similarly, denials of access to governmental forums have been invalidated even where it has been argued that the use of those forums would promote a racially discriminatory organization. Thus, in National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973), the Court held that a county school board was prohibited under the First Amendment from refusing to rent a school building during non-school hours on the grounds that the group had a racial discriminatory membership policy. The Court stated.

> . . . the School Board's denial of the use of a public forum because of the Party's discriminatory membership policies constitutes as much of an invalid prior restraint as if it had denied the Party the use of the forum on the basis of the controversial beliefs which the Party would express at that place. 32/

But see, Gilmore v. Montgomery, 417 U.S. 556 (1974). These cases would appear to indicate that the objectives sought to be achieved through Titles VI and IX do not justify their impact on First Amendment interests.

Other cases militate in the opposite direction. Thus, the Supreme Court has upheld against constitutional challenge the provisions of the Hatch Act that preclude partisan political activity by government employees, see United Public Workers v. Mitchell, 330 U.S. 75 (1947); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), and it has rejected First Amendment attacks on regulations precluding newspapers from printing help wanted advertisements soliciting applicants of only one sex. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). Most recently, it upheld against constitutional attack the provision of the Federal Election Campaign Act which limited the permissible expenditure level of presidential candidates who received federal financial assistance by rejecting the argument that such limitation violated the First Amendment rights of candidates. The Court stated that the provision:

32/ 473 F.2d at 1016.

> "is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." 33/

This rationale would appear to apply also to the Facilities Act. Indeed, the Court in Buckley cited federal assistance to public broadcasting as a form of legislation advancing First Amendment values.

> ". . . the central purpose of the Speech and Press Clause was to assure a society in which "uninhibited, robust, and wide-open debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish . . . Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §390-399." 34/

It is not a great intellectual step to carry this argument further and apply it to Titles VI and IX. Both those provisions are designed, at least insofar as financial assistance to public broadcasting is concerned, to insure that the benefits of the medium are made available to all. It can be argued that in many respects those provisions are similar to the obligations of the

33/ Buckley v. Valeo, 46 L.Ed. 2d at 729-30 (footnotes omitted).

34/ Id. at 730 n. 127.

fairness doctrine and the personal attack rules upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

These cases can, however, also be distinguished. In none was the governmental involvement with speech as direct, immediate and content related as is the case under Titles VI and IX. Thus, in Buckley, the limitation or expenditures was unrelated to the content of the speech involved and in the Hatch Act cases, the regulation was stated in general terms and did not necessitate governmental consideration of the content of the speech to determine whether a violation was stated. The Pittsburgh Press case involved commercial speech, something which has always enjoyed a lesser degres of protection. Here, however, HEW will, as demonstrated above, become intimately involved in the program decision making of public broadcast licensees, passing on the adequacy of their efforts on the basis of the content of the programming broadcast. Such regulation goes to the very core of the First Amendment interests. Thus, just as the Supreme Court upheld the fairness doctrine in Red Lion, supra, it also struck down in Columbia Broadcasting Sys., Inc., supra access requirements, allegedly based on the same considerations, on the grounds that the enforcement of that requirement would involve the government inpermissibily in the day-to-day activities of

broadcasters. Enforcement of Titles VI and IX would appear to involve similar factors.

However, even if the objectives sought to be achieved by Titles VI and IX are sufficiently compelling to override the First Amendment interests of public broadcasters, it remains questionable whether their enforcement is constitutionally permissible for the provisions are impermissibly vague. It is well settled that statutes that affect First Amendment rights must be narrowly drawn and establish standards of conduct that men of common intelligence can clearly discern. See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 371 U.S. 415. (1963); Smith v. California, 361 U.S. 147 (1959); Lanzetta v. New Jersey, 306 U.S. 451 (1939). Further, the statutory scheme must be carefully structured to reach only that activity within the permissible scope of legitimate government regulation. Smith v. Goguen, 415 U.S. 566 (1974); Baggett v. Bullitt, supra; Winters v. New York, 333 U.S. 507 (1948). It is questionable whether enforcement of Titles VI and IX can satisfy these requirements.

Sections 601 and 901, when read together, preclude public broadcasters who have received federal financial assistance under the Facilities Act from excluding any person from

participation in, denying any person the benefits of, or otherwise subjecting any person to discrimination on the basis of race, color, sex or national origin under the program of assistance established by the Facilities Act. While the concept of what constitutes discrimination or the denial of the benefits of a program of federal financial assistance are reasonably clear in the context of welfare programs, programs for the construction of schools or hospitals, or other similar grants of assistance, those terms are quite amorphous when applied to broadcasting. With the possible exception of the intentional disregard of the needs of a significant racial or ethnic group in its service area, see, e.g., Alabama Educational Commission, supra, or the failure to carry either any Spanish-language programs or any Spanish-language subtitles in a market in which there is a significant non-English-speaking Spanish-speaking population, the definition of the statutory prohibition is unclear. Is the broadcast of only general interest programming a denial of benefits to a minority group even though the licensee presents programs covering issues of common concern to both dominant and minority groups? Does the broadcast of Shakespeare "benefit" blacks, and would Hamlet do so less than Othello? Does a licensee serving an area with a significant black population have an obligation to include programs dealing with the cooking of "Soul Food" in its cooking program? Does the

licensee in an area with a significant Greek population have an obligation to carry musical works of particular interest in the Greek community? Does a licensee with a significant Oriental population have to include in its American history high school course programs dealing with the contributions of Orientals? Where a racial minority represents, for example, 30% of the community, must a station broadcast precisely 30% of its programs to meet their special needs and interests in order not to restrict their enjoyment of the benefits of federal funding? Or must it ensure that the participants in each program exactly reflect the racial makeup of the community? The answer to these questions is far from clear yet they are merely the obvious ones and just touch the surface of the problem.

The problem is even more difficult in the context of sex discrimination. Does news appeal to women less than men? Must sports programming be equally divided between women's and men's sports, and, indeed, are women's sports programs of greater interest to women than to men? Must dramatic work portray women in the same light as men and, to borrow from commercial broadcasting, must a public broadcaster match an "Edith Bunker" with a "Fay?"

HEW's regulations do little to solve this difficulty. Section 803., which purports to define discrimination, merely

defines the term as "(i) Deny[ing] an individual any service, financial aid, or other benefit provided under the program; (ii) Provid[ing] any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; . . . (iv) Restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program . . ." These provisions are only slightly more helpful than the statute itself.

In addition, the one regulation which specifically deals with broadcasting is not significantly more helpful, with the possible exception of suggesting that requirements as stringent as those calling for proportional programming would not be imposed. Thus, Section 80.5(g) states:

> "(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant."

As indicated above, the term "due consideration" is a hopelessly vague formulation which does not even reveal whether affirmative special interest programming in any quantity is expected, or whether a simple effort to keep in touch with the community and to reflect those contacts in program choices, similar to FCC ascertainment procedures, is sufficient.

In the absence of a clearer definition of discrimination under Sections 601 and 901, the provisions would appear to lack the specificity required of regulations affecting First Amendment interests. Public broadcasters have virtually no guidance as to what is required of them in order to avoid the commencement of enforcement proceedings. In addition, HEW itself is without any guidance as to what constitutes a violation of or compliance with the Act. It is thus possessed of virtually unfettered discretion as to how it will apply the provisions of the Act. Such discretion is impermissible where protected rights are concerned.[35/] Interstate Circuit, Inc. v. Dallas, 390 U.S. 767 (1968); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

35/ While this defect might arguably be cured through the adoption of guidelines of sufficient specificity, it is doubtful whether that specificity can be achieved and still serve the objectives of Titles VI and IX. Defining discrimination or the denial of benefits in terms merely of non-exclusion or disregard of needs would seem to fall far short of the statutory objectives. Such a definition would merely require nominal efforts and although it can be argued that the two Titles are merely intended to preclude active discrimination and thus such a requirement for public broadcasters would satisfy the statute, the statutory language itself, its legislative history and HEW's regulations clearly evidence an intent to impose a more affirmative allegation. See Lau v. Nichols, 414 U.S. 563 (1975). Further, such a definition would render HEW's enforcement powers largely duplicative of the powers of the FCC.

IV. Conclusion

This review of the statutory and constitutional factors relative to the enforcement of Titles VI and IX with respect to public broadcasting indicate that there are substantial questions as to whether those provisions authorize such enforcement and, if they do, whether such enforcement is constitutionally permissible. The provisions of Sections 602 and 902 limiting the authority to enforce the respective Titles to regulations consistent with the achievement of the objectives of the Facilities Act seems to preclude HEW's enforcement of those Titles. The Facilities Act is clear that the provision of assistance and the statute was not to be used as a mechamism for supervising or controlling the programming of recipients of that assistance. Title VI and IX enforcement would, of necessity, require HEW to engage in such supervision and control.

Further, even if such enforcement were authorized by the statute, serious constitutional questions are raised by the resultant involvement of HEW in the program decision-making process of public broadcasters. It is far from clear that the government's interest in assuring the benefits of public broadcasting to all justifies such intrusion into the First Amendment rights of the public broadcasters. Moreover, even if such regulation is justified on an abstract basis, the provisions

of Titles VI and IX are far too vague to satisfy First Amendment standards. Both the broadcaster and HEW are left without any guidance as to what satisfies the two Titles. Such standardless control of programming can not pass First Amendment scrutiny.

Title VI

SUBCHAPTER V.—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Pub. L. 88–352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2000d–1 of this title; title 39 section 410.

§ 2000d–1. Federal authority and financial assistance to programs or activities by way of grant, loan or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to congressional committees; effective date of administrative action.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report. (Pub. L. 88–352, title VI, § 602, July 2, 1964, 78 Stat. 252.)

EQUAL OPPORTUNITY IN FEDERAL EMPLOYMENT

Nondiscrimination in government employment and in employment by government contractors and subcontractors, see Ex. Ord. No. 11246, Sept. 24, 1965, 30 F.R. 12319, and Ex. Ord. No. 11478, Aug. 8, 1969, 34 F.R. 12985, set out as notes under section 2000e of this title.

EX. ORD. NO. 11247. COORDINATION OF ENFORCEMENT

Ex. Ord. No. 11247, Sept. 24, 1965, 30 F.R. 12327, provided:

WHEREAS the Departments and agencies of the Federal Government have adopted uniform and consistent regulations implementing Title VI of the Civil Rights Act of 1964 [sections 2000d to 2000d–4 of this title] and, in cooperation with the President's Council on Equal Opportunity, have embarked on a coordinated program of enforcement of the provisions of that Title;

WHEREAS the issues hereafter arising in connection with coordination of the activities of the departments and agencies under that Title will be predominantly legal in character and in many cases will be related to judicial enforcement; and

WHEREAS the Attorney General is the chief law officer of the Federal Government and is charged with the duty of enforcing the laws of the United States:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, it is ordered as follows:

SECTION 1. The Attorney General shall assist Federal departments and agencies to coordinate their programs and activities and adopt consistent and uniform policies, practices, and procedures with respect to the enforcement of Title VI of the Civil Rights Act of 1964. He may promulgate such rules and regulations as he shall deem necessary to carry out his functions under this Order.

SEC. 2. Each Federal department and agency shall cooperate with the Attorney General in the performance of his functions under this Order and shall furnish him such reports and information as he may request.

SEC. 3. Effective 30 days from the date of this Order, Executive Order No. 11197 of February 5, 1965, is revoked. Such records of the President's Council on Equal Opportunity as may pertain to the enforcement of Title VI of the Civil Rights Act of 1964 shall be transferred to the Attorney General.

SEC. 4. All rules, regulations, orders, instructions, designations and other directives issued by the President's Council on Equal Opportunity relating to the implementation of Title VI of the Civil Rights Act of 1964 shall remain in full force and effect unless and until revoked or superseded by directives of the Attorney General.

LYNDON B. JOHNSON.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2000d–2, 2000d–5 of this title; title 39 section 410.

§ 2000d–2. Judicial review; Administrative Procedure Act.

Any department or agency action taken pursuant to section 2000d–1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d–1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section. (Pub. L. 88–352, title VI, § 603, July 2, 1964, 78 Stat. 253.)

REFERENCES IN TEXT

Section 1009 of Title 5, referred to in the text, was repealed in the general revision of Title 5, and the provisions are now covered by sections 701–706 of Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is refererd to in title 39 section 410.

§ 2000d–3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment.

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. (Pub. L. 88–352, title VI, § 604, July 2, 1964, 78 Stat. 253.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is refererd to in title 39 section 410.

§ 2000d–4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty.

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Pub. L. 88–352, title VI, § 605, July 2, 1964, 78 Stat. 253.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is refererd to in title 39 section 410.

§ 2000d–5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged noncompliance with Civil Rights Act.

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by th Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d–1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided*, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned. (Pub. L. 89–750, title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub. L. 90–247, title I, § 112, Jan. 2, 1968, 81 Stat. 787.)

REFERENCES IN TEXT

"This Act", referred to in text, is the Elementary and Secondary Education Amendments of 1966, (Pub. L. 89–750. For classification of Pub. L. 89–750 see Short Title note under section 841 of Title 20, Education.

The Elementary and Secondary Education Act of 1965, referred to in text, is Pub. L. 89–10, which enacted chapter 24 and sections 241a—241*l*, 331a, 322a, and 332b of Title 20, Education, and amended sections 236—241, 242—244, 331, and 332 of Title 20.

The Act of September 30, 1950 (Pub. L. 874, Eighty-first Congress), referred to in text, is classified to section 236 et seq. of Title 20, Education.

The Act of September 23, 1950 (Pub. L. 815, Eighty-first Congress), referred to in text, is classified to section 631 et seq. of Title 20, Education.

The Cooperative Research Act, referred to in text, is classified to section 331 et seq. of Title 20, Education.

CODIFICATION

Section was enacted as part of the Elementary and Secondary Education Amendments of 1966, Pub. L. 89–750, and not as part of the Civil Rights Act of 1964, Pub. L. 89–352, which enacted this subchapter.

AMENDMENTS

1968—Pub. L. 90–247 added the proviso to this section.

EFFECTIVE DATE

Section effective with respect to fiscal years beginning after June 30, 1966, see section 191 of Pub. L. 89–750, set out as a note under section 241b of Title 20, Education.

§ 2000d–6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies.

(a) Declaration of uniform policy.

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity.

Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements.

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to elmininate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) Additional funds.

It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States. (Pub. L. 91–230, § 2, Apr. 13, 1970, 84 Stat. 121.)

REFERENCES IN TEXT

Title VI of the Civil Rights Act of 1964, referred to in subsecs. (a) and (c), is set out in sections 2000d to 2000d—4 of this title.

Section 182 of the Elementary and Secondary Education Amendments of 1966, referred to in subsec. (a), is classified to section 2000d—5 of this title.

CODIFICATION

Section was enacted as part of the Elementary and Secondary Amendments of 1969, Pub. L. 91–230, and not as part of the Civil Rights Act of 1964, Pub. L. 89–352, which enacted this subchapter.

Chapter 38.—DISCRIMINATION BASED ON SEX OR BLINDNESS [NEW]

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 1232 of this title; title 29 section 206.

§ 1681. Sex.

(a) Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition.

In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions.

In regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets.

This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine.

This section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy.

In regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex; and

(6) Social fraternities or sororities; voluntary youth service organizations.

This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined.

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department. (Pub. L. 92-318, title IX, § 901, June 23, 1972, 86 Stat. 373, amended Pub. L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862.)

REFERENCES IN TEXT

"This chapter", referred to in subsecs. (b) and (c), read in the original "this title", meaning title IX of Pub. L. 92-318 which is classified to this chapter and amended sections 203 (r)(1), (s)(4) and 213(a) of Title 29, Labor, and sections 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare.

AMENDMENTS

1974—Subsec. (a). Pub. L. 93-568 added par. (6).

EFFECTIVE DATE OF 1974 AMENDMENT

Section 3(b) of Pub. L. 93-568 provided that: "The provisions of the amendment made by subsection (a) [amending this section] shall be effective on, and retroactive to, July 1, 1972."

REGULATIONS; NATURE OF PARTICULAR SPORTS: INTERCOLLEGIATE ATHLETIC ACTIVITIES

Pub. L. 93-380, title VIII, § 844, Aug. 21, 1974, 88 Stat. 612, provided that: "The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act [Aug. 21, 1974], proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 [this chapter] relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1682 of this title.

§ 1682. Federal administrative enforcement; report to congressional committees.

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report. (Pub. L. 92-318, title IX, § 902, June 23, 1972, 86 Stat. 374.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1683 of this title.

§ 1683. Judicial review.

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title. (Pub. L. 92-318, title IX, § 903, June 23, 1972, 86 Stat. 374.)

CODIFICATION

"Section 1682 of this title", where first appearing, was substituted for "section 1002" appearing in the Statutes at Large as conforming to intent of Congress as Pub. L. 92-318 was enacted without any section 1002 and, subsequent, text refers to "section 902", codified as "section 1682 of this title".

§ 1684. Blindness or visual impairment; prohibition against discrimination.

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment. (Pub. L. 92-318, title IX, § 904, June 23, 1972, 86 Stat. 375.)

§ 1685. Authority under other laws unaffected.

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Pub. L. 92-318, title IX, § 905, June 23, 1972, 86 Stat. 375.)

REFERENCES IN TEXT

"This chapter", referred to in the text, read in the original "this title", meaning title IX of Pub. L. 92-318 which is classified to this chapter and amended sections 203 (r)(1), (s)(4) and 213(a) of Title 29, Labor, and sections 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare.

§ 1686. Interpretation with respect to living facilities.

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes. (Pub. L. 92-318, title IX, § 907, June 23, 1972, 86 Stat. 375.)

REFERENCES IN TEXT

"This chapter", referred to in the text, read in the original "this title", meaning title IX of Pub. L. 92-318 which is classified to this chapter and amended sections 203 (r)(1), (s)(4) and 213(a) of Title 29, Labor, and sections 2000e(b), 2000c-6(a)(2), 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare.

This Act, referred to in the text, means Pub. L. 92-318 which enacted the Education Amendments of 1972. For classification of Pub. L. 92-318 in the Code, see Distributions Table.